No. 12,454

IN THE

United States Court of Appeals

For the Ninth Circuit

THE LONDON ASSURANCE, a corporation,
Appellant,

vs.

LOUIS P. LUTFY and BERTHA A. LUTFY, husband and wife,
Appellees.

Appeal from the United States District Court, District of Arizona.

APPELLANT'S OPENING BRIEF.

WILLIAM A. WHITE,
EDWARD A. BARRY,
391 Sutter Street, San Francisco 8, California,
Attorneys for Appellant.

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STATEMENT OF THE CASE.

Plaintiffs and appellees commenced an action on an insurance policy insuring against loss of an automobile by theft, against defendant and appellant in the Superior Court of the State of Arizona in and for the County of Maricopa (page 2, T.R.) on March 25, 1948.

The case was thereafter transferred to the United States District Court for the District of Arizona (pages 15, 16, T.R.).

Issue was joined by the filing of an amended answer by defendant insurance company (pages 18-24, T.R.).

A pre-trial conference was had on February 7, 1949, and February 10, 1949 (page 90, T.R.), and a memorandum of decision was made on February 25, 1949.

A minute order was made on April 12, 1949, setting aside the judgment on the grounds the issues were not settled by admissions or the pre-trial conference (page 95, T.R.).

The Court thereafter reconsidered the matter, including all the exhibits: Plaintiffs' A and Defendant's 1, 2 and 3, and on December 6, 1949, signed plaintiffs' proposed findings of fact and conclusions of law (pages 96-98, T.R.) and thereafter ordered judgment for plaintiffs in the sum of $5,420.00.

Defendant made the motion for new trial on December 6, 1949, which was denied on December 14, 1949. Defendant and appellant gave notice of appeal on December 22, 1949 (pages 105-106, T.R.), and filed a Supersedeas Bond on appeal on the same day (pages 106, 107 and 108, T.R.).

On January 16, 1950, the Clerk's Certificate record on appeal was filed in the Clerk's office of Circuit Court (pages 108-112, T.R.).

On January 24, 1950, appellant filed in the office of the Clerk of the Circuit Court its Concise Statement of Points on which it intends to rely (pages 112-116, T.R.) and its Designation of Record (page 117, T.R.).

ADMISSIONS ON PRE-TRIAL CONFERENCE.

1. That plaintiffs and appellees are residents in the State of Arizona.

2. That defendant and appellant is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Great Britain.

3. That the subject matter exceeds the sum of Three Thousand Dollars ($3,000.00).

4. That appellant issued its insurance policy No. 148323 insuring appellees against loss by theft of a 1947 Lincoln Continental Convertible Coupe, which policy is a part of the record on appeal (pages 25-36, T.R.).

5. That the automobile described in the policy was a 1946 model and was manufactured in that year. It had an actual cash value of Five Thousand Four Hundred Twenty Dollars ($5,420.00).

STATEMENT OF FACTS.

In September of 1947 appellees, a doctor and his wife, of Phoenix, Arizona, desired to buy a new Lincoln automobile. Certain used car dealers in Phoenix advised them that through another car dealer, Consolidated Motors, in Tuscon, a new Lincoln Continental could be purchased in Chicago, Illinois. Mrs. Lutfy, the wife, flew to Chicago where she met a man named Marciano, who took her to see the car and then went to a bank in Chicago.

After giving a check in the sum of Five Thousand Six Hundred Dollars ($5,600.00) to the bank, she received some documents purporting to be a "title" to the automobile. She left the bank with Marciano and the supposed seller and went back to the place where she had seen the automobile. She then gave Marciano the Arizona license plates which she had taken off a Buick automobile which the appellees owned, and gave Marciano the documents, requesting him to have the title of the car transferred to the appellees' names. On September 19, 1947, she phoned her husband, Dr. Lutfy, from Chicago that she had purchased a new car and requested that he obtain insurance on it. On the same day, Dr. Lutfy phoned his insurance agent and gave him the year number, motor number, serial number and the cost, telling him it was a 1947 model, and that the car was new. He asked him to issue an insurance policy, which policy was issued (pages 25-36, T.R.).

Thereafter, Mrs. Lutfy drove the car from Chicago, Illinois, to Phoenix, Arizona, with the Arizona license plates on it. Thereafter, appellee, Dr. Lutfy, drove it until October 28, 1947, when it disappeared from outside his office in Phoenix, Arizona, still having the Arizona license plates on it.

Subsequently, the F.B.I. discovered the car in Florida and obtained all the registration certificates and certificates of title on the automobile from the State of Illinois and the State of Florida (pages 69-89, T.R.), none of which showed any transfer to the appellees or either of them.

LEGAL QUESTIONS INVOLVED.

I.

May Plaintiffs and Appellees Recover on an Insurance Policy When They Were Not the Sole and Unconditional Owners of the Automobile:

1. Did not have clear title;
2. Title was in a third party;
3. Plaintiffs had no insurable interest in automobile?

II.

Did Plaintiffs and Appellees Make Misrepresentations of Material Facts Which Voided Policy:

1. Stating it was a new car;
2. Stating it was a 1947 model;
3. Stating there was no lien or encumbrance on it?

III.

Did Plaintiffs and Appellees Conceal Material Facts Which Voided Policy:

1. Not new car;
2. Lien on car;
3. Method of purchase of car;
4. Placing of Arizona license plates on car?

IV.

Did Plaintiffs Breach Insurance Policy by Inability to Grant Appellant Subrogation Rights:

1. Could not execute and deliver instruments of title to appellant?

ARGUMENT.

I.

THE CONTRACT BETWEEN THE PARTIES HEREIN IS THE INSURANCE POLICY ISSUED (PAGES 25-30, T.R.).

It provides in part:

> "Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the insured is the sole owner of the automobile, except as herein stated: No exceptions."

If the plaintiffs did not own the automobile, then they cannot recover under the policy.

> "The burden was upon the plaintiff to establish his insurable interest in the property described in the policy, and that burden required that he establish the interest which was defined in the policy. The recital of ownership is a valid provision and by the very terms of the policy the insurance was void if the insured was other than the unconditional and sole owner. This the evidence failed to establish." (30 A.L.R. 661).

As shown by the facts, all appellees acquired was possession of the car in question. The documentary evidence (Defendant's Exhibits 2 and 3, pages 69-89, T.R.), definitely shows that appellees never acquired title to the car.

In fact, appellees neither alleged nor proved ownership of the car in question (pages 1-5, T.R.).

Examine the defendant's Exhibits 2 and 3 closely and compare them with the story of appellees (pages 36-69, T.R.).

The documents definitely show that Don E. Jordan was the owner (page 76, T.R.) by the original Bill of Sale and the Certificate of Title issued therefor.

They also show that the Certificate of Title was surrendered on October 24, 1947 (page 77, T.R.), and an Assignment of Title made on October 22, 1947, to Henry Green (page 78, T.R.) and a new Certificate of Title issued to him on October 24, 1947 (pages 81, 82, T.R.).

It is also quite significant that on the day Mrs. Lutfy, an appellee, claims that she bought the automobile, September 19, 1947, the car was mortgaged to the Exchange National Bank (pages 71, 73, T.R.), and said lien was not released until October 16, 1947 (page 71, T.R.).

It is hard to believe that a large Chicago Bank would be a party to a fraud or that its records would not truthfully record the true facts of a business transaction. If Mrs. Lutfy was in that Bank on September 19, 1947, and if she paid the Bank and Don E. Jordan Five Thousand Four Hundred Twenty Dollars ($5,420.00), why did she not receive the original Certificate of Title from the Bank with its stamp on it, showing that its lien was paid? Everyone knows that in borrowing money from a Bank with a car used as Security, the Certificate of Title is held by the Bank until its lien is paid off.

Was Mrs. Lutfy in that Bank? Did Mrs. Lutfy receive any Certificate of Title? She claims she signed her name where the purchaser should sign (page 61,

T.R.). It is significant that such place is blank on the Certificate of Title on which the Bank released its lien (page 71, T.R.).

It is also significant that if Mrs. Lutfy had any Certificate of Title for this car in her hands, she failed to notice: (1) That it was a 1946 Model (pages 69, 70 T.R.); and (2) That it was purchased on January 8, 1947 (page 70, T.R.), and was, therefore, not a new car.

The following statements in Defendant's Exhibits 2 and 3 (pages 69-89, T.R.) are set forth herein for emphasis:

> (Page 83, T.R.): "A title application should accompany this application if an Illinois title has not been issued in your name for this vehicle. If new car purchased dealer must execute Bill of Sale on back of your title application. If used car purchased send assigned title with these applications."
>
> (Page 81, T.R.): "If application is for registration of a New car purchased from a dealer for which a Certificate of Title has not previously been issued, Dealer must complete bill of sale form at bottom of application. (Sec. 4(b).)"
>
> (Page 75, T.R.): "Certificate of Title must be assigned and delivered to purchaser.
>
> The Motor Vehicle Anti-Theft Act, approved May 11, 1933, provides that the Secretary of State shall not after January 1, 1934, register or renew a registration of any motor vehicle, unless and until the owner shall make application for and be granted a Certificate of Title. (Sec. 3 (a).)"

(Page 74, T.R.): "Before accepting an assigned title, liens on face of title must be stamped paid and signed by lien holder or an authorized official."

"Any changes, erasures, mutilations, ink eradications upon Bill of Sale, Certificate of Title, Certificate of Origin voids assignment and will not be accepted."

(Page 77, T.R.): "Keep this Certificate of Title in a safe place. Do not accept title showing any erasures, alterations or mutilations."

How could appellee have had a Certificate of Title or any document regarding a motor vehicle registered in the State of Illinois and not seen at least one of the above statements?

If it were a new car, she should have an original Bill of Sale executed by a dealer. If it had a lien on it, she should have had the Bank mark the lien paid.

If she could read, she should have seen the year model, the original date of sale and the lien.

The only conclusion that can be drawn from these facts is that she paid her money to a thief who could not pass title to the car to her.

46 *Am. Jur.* 622: "In pursuance of the general rule that a person cannot transfer a better title to a chattel than he himself has, one who has acquired possession of property by a crime such as theft cannot confer title by a sale even to a bona fide purchaser."

46 *Am. Jur.* 623: "As to transfers and encumbrances of interests in personal property gen-

erally, it is a general rule that the fact that the owner has intrusted someone with mere possession and control of personal property is not sufficient to estop the real owner from asserting his title against a person who has dealt with the one in possession on the faith of his apparent ownership or apparent authority to sell * * *"

The documentary evidence shows the appellees had no title. All the evidence shows that appellees had no insurable interest in the car.

Hessen v. Iowa Automobile Mutual Ins. Co., 195 Iowa 141, 190 N. W. 150:

"Whatever interest plaintiff had in the insured property must have been derived under his contract of purchase. His vendor is not shown to have had anything more than the possession of a stolen car. Through his purchase plaintiff acquired no title and clearly never had such ownership as was required and defined by the terms of the policy * * *"

An insurance company does not insure a possessory interest and particularly one based on such duplicity that existed herein (30 A.L.R. 661).

II.

DID APPELLEES MAKE MISREPRESENTATIONS OF MATERIAL FACTS WHICH VOIDED POLICY?

One of the clauses of the policy reads as follows:

> (Page 35, T.R.): "This policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof * * *"

There is no question but what appellees made misrepresentations as follows:

1. It was a new car (page 39, T.R.).

2. That it was a 1947 model (page 38, T.R.).

3. That it had no lien or encumbrance on it (page 39, T.R.).

Appellees ratified those representations when they accepted the policy (pages 25-30, T.R.) with the declarations to the same effect in the policy. For emphasis we quote another portion of the policy:

> (Page 35, T.R.): "16. Declarations. By acceptance of this policy the insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations * * *"

There is no question that the policy calls for voidance of the policy because of these representations (see supra).

The only question remaining is whether those misrepresentations were with regard to "material facts".

What is a material fact in this instance? The matter of materiality is codified in the California Insurance Code as follows:

> "Sec. 334. Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

The textwriter in 29 *Am. Jur.* at page 424 states the rule:

> "The generally accepted test for determining the materiality of a fact or matter as to which a representation is made to the insurer by an applicant for insurance is to be found in the answer to the question whether reasonably careful and intelligent underwriters would have regarded the fact or matter, communicated at the time of effecting the insurance, as substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium. * * *"

It is also stated in 149 A.L.R., page 531, as follows:

> "In cases involving policies insuring owners of motor vehicles against loss by reason of fire or theft, statements as to the year of manufacture or model of the motor vehicle to be insured are generally held to be representations of material facts, the falsity of which will avoid the risk."

If the Court will for a moment look back to the year 1946, it will be recalled that this was the period

of reconversion from war to peace. That during this period great demand was being made for automobiles. That each and every model was in great demand and the highest priced cars were still under price controls. The demand far exceeded the available models. There followed during this period a lucrative business which, because of the nature of the market, thrived. New cars were sold at illegal premiums. Used cars brought fabulous prices. Insurance companies were accustomed to having all kinds of frauds worked upon them. Because of this and because of the condition of the times, suspicion was developed when in the year 1947 a car manufactured in 1946 was sold as new. Immediately a question was presented. Was this a new car? Was it a car that was in the hands of illegal dealers? Why was it never sold before? What was its condition? Were the purchasers people of good character? Were they proper risks? Should the car be insured? These are just a few of the doubts raised by the simple fact that a 1946 car was sold for new in 1947.

Had the company been told of the year model, an investigation would have been required. A part of such check would have been a search of the title of ownership.

So, when we first look at the facts, what seemed an unimportant warranty as to year, now has great significance.

It was material for an underwriter to know if the car was a new or used car. If it was a used car, he might be put on inquiry as to who was former owner,

what was the condition of it, had it been in a previous wreck, and numerous other questions not necessary or material to ask if the car insured was new.

In the case of *Strangio v. Consolidated Indemnity Ins. Co.,* 66 F. (2d) 330, at page 333, the Court said:

> "In *Stipcich v. Met. Life Insurance Co.,* 277 U.S. 311, 316-318, 48 S.Ct. 512, 513, 72 L. Ed. 895, Mr. Justice Stone said: 'Insurance policies are traditionally contracts uberrimae fidei and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option." (Cases Cited).
>
> Page 333: "If, while the company deliberates, he discovers facts which make portions of his application no longer true, the most elementary spirit of fair dealing, would seem to require him to make a full disclosure. If he fails to do so, the company may despite its acceptance of the application decline to issue a policy (citing cases), or if a policy has been issued, it has a valid defense to a suit upon it." (Cases).

See also:

> *Gates v. General Casualty Co. of America,* 120 F. (2d) 925.

In the case of *Palmquist v. Standard Accident Ins. Co.,* 3 F. Supp. 356, at page 358, the Court said:

> "The determination of the materiality of a representation is a question of law for the Court, and it has been held error to submit to the jury the materiality of a false answer given by the insured with reference to his occupation." (14 *Cal. Jur.* 49).

"* * * It seems to be generally agreed that the parties themselves, having asked and answered questions, must be held to have agreed that the question was material."

Was the fact that the car had a lien on it material?

The contract has provisions with regard to that:

(Page 26, T.R.): "Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the insured is the sole owner of the automobile, except as herein stated: No exceptions."

(Page 27, T.R.): "Purchased Month 9, Year 1947, New, Encumbrance None."

(Page 30, T.R.): "Exclusions. This policy does not apply: * * *

(b) Under any of the coverages, while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy;"

The very fact that the question of a lien is raised in the policy in three different places should be sufficient to show that it is a very material fact. A borrower may not be as good a risk as a cash buyer. The insurance company should have the benefit of that requested information.

But the main point regarding the materiality of those representations is that if the true facts had been told, the type of inquiry and the determination as to the probabilities of accepting the risk would be different.

And that the defendant was misled will be seen from our argument under the next heading of Concealment.

III.

DID PLAINTIFFS AND APPELLEES CONCEAL MATERIAL FACTS WHICH VOIDED POLICY?

Under this heading all of the matters and law cited under the previous heading apply.

Gates v. General Cas. Co. of America (1941) 120 F. (2d) 925:

> "The finding that concealment by the insured was fraudulently made is surplusage, since a concealment, whether intentional or unintentional, of fact material to the risk vitiates an insurance policy."

In addition, however, we have the additional points of concealment of the method of purchase and the placing of Arizona license plates on the car in question.

Any analysis of the method of purchase from its inception would cause suspicion if known by an insurance company. Before leaving for Chicago, Mrs. Lutfy was given the name of a man, Marciano, and a phone number to call him. She was told to take the Arizona license plates from a Buick car, to take them back to Illinois and put them on the purchased car. The "new" car was to cost Five Thousand Nine Hundred Dollars ($5,900.00) (page 42, T.R.), but when she arrived, Mrs. Lutfy "made a deal" (page 55, T.R.) whereby, first, it would only cost her Five Thousand

Six Hundred Dollars ($5,600.00) (page 45, T.R.), which was then reduced to Five Thousand Four Hundred Twenty Dollars ($5,420.00), because of some white-wall tire transaction (page 55, T.R.).

If those two facts were not enough to arouse her suspicion entirely, the fact that the car was registered in Illinois in an individual name (page 66, T.R.) and also that she had to go to a bank to buy this "new" car should have put her on her guard. But apparently not, and she did not think enough about it to tell her insurance agent or company any of these facts regarding the purchase or the registration in Illinois in an individual's name rather than in a dealer's name.

The textwriter in 29 *Am. Jur.* § 540, at page 436 states:

> "Contracts of insurance have been deemed, broadly speaking, to be contracts uberrimae fidei, that is, of the utmost good faith, and the applicant for insurance is bound to deal fairly with the insurer in the disclosure of facts material to the risk. * * *"

The same writer, at page 438, 29 *Am. Jur.* states:

> "The insured may not withhold information of such unusual and extraordinary circumstances of peril to the property as could not, with reasonable diligence, be discovered by the insurer or reasonably anticipated by it as a foundation for specific inquiries."

Attention should be called to the fact that these representations were made over the telephone to the in-

surance agent (page 38, line 2, T.R.). There was not much opportunity to make inquiry in such a phone conversation. Also the concealments involved transactions occurring over 2,000 miles away in Chicago, Illinois. While the plan to attach the Arizona license plates to the car was conceived in Arizona, the actual transaction took place in Illinois. All the other phases of concealment of material matters, such as the bank transaction, the fact of the Illinois registration and the signing of the "title", occurred in Chicago, where the defendant would not have any opportunity of inquiry unless the facts had been revealed.

When the facts are disclosed by a mere examination of the Certificate of Title, it is manifest what the defendant-appellant could have ascertained regarding the car if the above facts had not been concealed.

Appellees were not without some knowledge regarding the situation, as shown when questioned about new Arizona license plates and getting the Certificate of Title.

> (Page 48, T.R.): "A. No, I never did receive the certificate of title.
>
> Q. Did you ever make an application to the Arizona Motor Vehicle Department for a certificate of title?
>
> A. No, because I would have to have this Illinois title before I could do that."

> (Page 60, T.R.): "Q. You made no application to obtain an Arizona certificate of title?
>
> A. No, sir."

(Page 64, T.R.): "Q. You don't remember whether you put any other——

A. We didn't put any other plates on it, no. I don't remember.

Q. And do you know why you didn't ask or apply for Arizona license plates?

A. Because we had to have the certificate of title."

It is difficult to believe that a reputable Illinois motor car dealer would assist in the duplicity of defrauding either the State of Illinois or the State of Arizona out of a license tax on a new motor vehicle, yet we have here a record of appellees taking Arizona license plates from an old Buick car in Arizona and taking them back to Chicago.

(Page 60, T.R.): "Q. How did you get the Arizona plates for it?

A. Well, I just took some Arizona plates.

Q. Some that you had had on another car?

A. Yes, off the Buick.

Q. That was the Buick that you folks had owned here?

A. That is right.

Q. And you took the plates off of them?

A. That is right.

Q. Took them back to put on this car there?

A. Yes.

Q. And drove it out with the Arizona plates on it?

A. Yes, sir. Mr. Marciano put them on for me."

And Mr. Marciano, the supposed dealer put them on.

Who is Mr. Marciano? Where did Mrs. Lutfy meet him? She had his phone number (page 54, T.R.)—REPUBLIC 10567—and she met him in front of the Du Pont Company (page 63, T.R.).

> (Page 63, T.R.): "Q. And you don't know where?
>
> A. It was in Chicago. I will tell you—it was in front of the Du Pont Company, Du Pont de Nemours, one of their offices that I gave him the title. That is one thing that I remember.
>
> Q. You had the car at that time?
>
> A. Yes, it was parked right in front.
>
> Q. How did you happen to meet Marciano there?
>
> A. Chadwick and Walden had given me one of their cards. It was a card with A. Marciano on it and his telephone number, Republic 10567."

Does that sound like a reputable auto dealer? Does that entire transaction sound like a bona fide purchase in the open market? Appellant submits that these facts and the law on the concealment point alone require judgment to be entered for appellant.

IV.

DID APPELLEES BREACH THE INSURANCE POLICY BY INABILITY TO GRANT APPELLANT SUBROGATION RIGHTS?

Appellees pleaded that they had performed all the conditions of the policy (Par. IV, page 4, T.R.). This was denied by appellant in its amended answer (Par. IV, page 19, T.R.).

One of the clauses and a condition of the policy is as follows (page 34, T.R.):

> "9. Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organiaztion and the insured shall execute and deliver such instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing to prejudice such rights."

A reading of this clause together with the declarations in the policy regarding ownership will definitely establish the reason for requiring a clear title in the insured.

In case of a theft, the company attempts to find the car, and if a loss has been paid prior to recovery, it intends to be subrogated to the rights of the insured to make the recovery. In other words, the company, by contract, attempts to minimize its losses.

Appellees agreed to that clause. What happened here? The car was found, but appellees had no right of recovery, because they had no title. Title to the car was in Henry Green on October 27, 1947 (page 81, T.R.), and he transferred it to Henry Greenspon (page 82, T.R.), who in turn, transferred it to Paul G. Horvath (page 85, T.R.).

Appellees were unable to and did not "execute and deliver instruments and papers" to appellant. Nor did appellees do anything else toward recovery of the car or assisting appellant in perfecting their rights to recover the car.

(Pages 49-50, T.R.): "Q. Were you told by the Federal Bureau of Investigation who had the car and where it was?

A. Yes.

Q. And what did they tell you?

A. They stated that the car was sold in Miami, Florida, at an auction to a man by the name of G. Horvath, 368 Northeast 52d Street, Miami, Florida.

Q. Have you made any effort to repossess the car from that man?

A. No.

Q. Why was that?

A. Because it was up to the Insurance Company to repossess it."

It must be apparent to anyone reading the facts of this transaction that appellees have, throughout, endeavored to take advantage of whoever and whatever situation developed. They attempted to defeat the Arizona dealers, who made the deal for them (pages 52, 54, 55, T.R.). They got Marciano to lower the price (page 55, T.R.), and they attempted to defeat the State of Illinois and the State of Arizona out of their license fees. Now, having been bilked by their method of transacting business out of their money which they paid for temporary possession of a car, they attempt to claim under a contract of insurance, which they failed to abide by themselves.

A review of the Defendant's Exhibits 2 and 3 will show their inability to recover the car. No right of action exists for them against Green, Greenspon or Horvath for the recovery of the car.

They might have a right of action against Marciano for their money, and possibly against Don E. Jordan, if they can prove that he is the man Mrs. Lutfy met in the Bank. That right of recovery would not be for the car,—it would be for money had and received, and the appellant did not insure them against that theft.

And appellees have failed to produce and are unable to give appellant any instruments or documents to effect recovery of the car, which they represented to appellant belonged to them as sole and unconditional owners. And thus, appellees have not performed all the conditions of the policy as they allege in Paragraph IV of their Complaint, and are unable to live up to the conditions of Clause 9 of the policy (page 35, T.R.).

That clause ends by saying: "The insured shall do nothing after loss to prejudice such rights." According to appellees, it reads: "The insured shall do nothing."

These subrogation rights are often valuable and tend to cut the loss paid out by the insurance company. But this valuable right depends entirely upon the insured. As was stated at page 1001, 29 Am. Jur.:

> "The insurer's right of subrogation against third persons causing the loss paid by the insurer to the insured does not rest upon any relation of contract or privity between the insurer and such third person, but arises out of the contract of insurance and is derived from the insured alone. Consequently, the insurer can take nothing by subrogation but the rights of the insured, and is subrogated to only such rights as the insured possessed."

CONCLUSION.

Appellant submits that all the facts and documents show that appellees neither alleged nor proved that they were at any time sole and unconditional owners of the car and thus have failed to sustain the burden of proof required of them. Appellant further submits that by the uncontradicted record, appellees misrepresented and concealed facts of material value which, according to the contract, voids the policy, and finally, by their failure to have the title they represented themselves as having, they have defeated any subrogation rights of appellant, which rights are a substantial part of the policy.

By reason thereof, judgment should be reversed and entered for defendant on its motion made at the pretrial conference.

Dated, San Francisco, California,
April 12, 1950.

Respectfully submitted,
WILLIAM A. WHITE,
EDWARD A. BARRY,
Attorneys for Appellant.